No. 86-393

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

JAMES B. STANLEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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REPLY MEMORANDUM FOR THE UNITED STATES

In our opening brief, we argued that the court of appeals lacked jurisdiction to reconsider the dismissal of respondent's FTCA claims.[1] We also argued that, in any event, respondent's FTCA and *Bivens* claims are barred, respectively, by *Feres* v. *United States*, 340 U.S. 135 (1950), and *Chappell* v. *Wallace*, 462 U.S. 296 (1983). The Court

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[1]Respondent contends (Br. 15-16) that the judgment order dismissing the FTCA claim (Pet. App. 54a-55a) was not entered in accordance with Fed. R. Civ. P. 58, so that he is not barred from appealing the dismissal of his FTCA claim. There is no merit to that argument. As we explained in our opening brief (at 11-13), the judgment order is a separate document that fully complied with the requirements of Rule 58. Moreover, as we explained in our reply memorandum in support of our petition for a writ of certiorari (at 1-2 & n.1), the requirements of Rule 58 are expressly "[s]ubject to the provisions of Rule 54(b)," so a partial final judgment that complies with the requirements of Rule 54(b) starts the time for filing a notice of appeal running whether or not the judgment complies with the requirements of Rule 58.

plainly held in *Feres*, as a matter of statutory interpretation, that the FTCA did not waive sovereign immunity for actions based on injuries incurred by a service member incident to military service. In *Chappell*, the Court, looking in part to the reasoning underlying *Feres*, concluded that it would be inappropriate to recognize a *Bivens* remedy for military personnel against their military superiors.

1. Notwithstanding his own prior statements to the contrary and the Fifth Circuit's 1981 conclusion to the contrary, respondent now argues that his participation in the Army's chemical warfare tests in 1958 was not incident to military service. In part he is arguing for a revision of the *Feres* standard that would really eliminate the incident to service test by assigning it a new meaning looking to the effect of litigation on military discipline. That argument is fully discussed in our opening brief (at 16-20). Also, however, he appears to be making a factual argument that the Army's LSD testing program was not, in fact, a military activity. That factual argument is without merit.

The Army administered LSD to a number of service members in the 1950s, in response to reports that the Soviet Union had purchased a large quantity of LSD, in order to test its effects on soldiers. S. Rep. 94-755, 94th Cong., 2d Sess. 411-412 (1976).[2] In concluding that the administration of LSD to respondent at the Army's Chemical Warfare

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[2]Respondent complains (Br. 6-7) that the Senate Report concerning the Army program is not in the record. We know of no rule requiring the entry of congressional reports, which are available at law libraries throughout the country, into the record before they may be cited. Moreover, the findings of a Senate Select Committee are within judicial notice. See 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2410, at 338-361 (1971). In this case, where the alternative to taking judicial notice of the Senate's findings is to have respondent independently inquire into the Army's LSD testing program through this lawsuit, judicial notice is plainly warranted, since oversight of the military is committed to the political branches. See, *e.g.*, *United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 5-6.

Laboratories in Maryland in February of 1958 was incident to his military service, the Fifth Circuit in 1981 stated: "At the time Stanley was given LSD, he was a Master Sergeant in the Army who had volunteered to participate in an experimental program in lieu of his regular duties. The experiment was conducted on an Army base by and for the benefit of the Army. Thus, the relationship between Stanley and the allegedly negligent individuals stemmed from their official military relationship." Pet. App. 76a. The Fifth Circuit rejected respondent's argument that he was not acting incident to service because he had volunteered to take part in the program, and held that his FTCA claim must be dismissed, noting: "Stanley was receiving military pay and was promised a letter of commendation for his participation in the program. Clearly his participation in the program was activity incident to his military service." *Id.* at 77a.

In reviving respondent's FTCA claim *sua sponte*, the Eleventh Circuit did not disagree with the Fifth Circuit's conclusion that respondent was given LSD incident to military service. It instead concluded that "[t]oday, in the Eleventh Circuit, controlling precedent does not automatically or mechanically preclude Stanley's lawsuit under the FTCA or *Bivens* upon a finding that he suffered the complained of injury while performing duties incident to military activities" (Pet. App. 19a). It thus found—erroneously, we submit—that the occurrence of injuries incident to service is not a sufficient predicate for the denial of FTCA liability.

Furthermore, respondent's Second Amended Complaint (which does not include an FTCA claim) alleges that the defendants were acting "under color of a covert federal Army pro[gram]" (J.A. 7, ¶ 14).[3] Respondent now claims

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[3]Respondent's Second Amended Complaint (J.A. 3-10) contains counts alleging a *Bivens* action, an action under 42 U.S.C. 1983, and an action under 42 U.S.C. 1985. The complaint was filed four months

that that statement does not mean what it appears to mean—that he was injured incident to service—but only means that the defendants "were acting under the color of what was supposed to be an army program to test gas masks and protective clothing" (Br. 10). That is belied by the concluding statement in the same paragraph of the complaint, which alleges that he was deprived of his rights pursuant to "official policy" (J.A. 7, ¶ 14). Thus, it appears that even respondent essentially conceded that he was acting incident to military service when he was administered LSD, and presumably for that reason he abandoned his allegation that the government is subject to suit under the FTCA.

In addition, it is clear beyond dispute that the program in question was an official Army program. It was developed and conducted by the Army Intelligence Board and the directors of the Army's Chemical Warfare Laboratories (S. Rep. 94-755, *supra*, at 411) "by and for the benefit of the Army" (Pet. App. 76a). Respondent challenges the latter finding (Br. 28). In contending that the testing was not the sort of activity usually associated with the military, respondent ignores the existence of intelligence information indicating that the Soviet Union had purchased a large quantity of LSD, possibly for use as a weapon. S. Rep. 94-755, *supra*, at 411 n.100. The military frequently conducts weapons tests, including chemical weapons tests; its Chemical Warfare Laboratories were established for that purpose.

Contrary to respondent's suggestions (Br. 7-10, 25 n.14), the program was not operated by the Central Intelligence Agency (CIA), with the Army playing only a minor role. In

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before this Court held in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), that the concerns underlying the *Feres* doctrine are a special factor counseling against the recognition of the right of service members to pursue *Bivens* actions.

fact, the Senate Report criticized the Army for its failure to coordinate its activities with the CIA, which also carried out LSD testing in the 1950s (S. Rep. 94-755, *supra*, at 413-414). Moreover, the Senate Hearings relied upon by respondent show that the CIA was not involved in the program under which he was administered LSD. Respondent cites (Br. 8) a Defense Department memorandum, reprinted with the hearings, ostensibly to indicate that the Army and the CIA cooperated in conducting drug testing. The cited memorandum makes clear, however, that the three programs in which the Army and the CIA cooperated were conducted between 1969 and 1973, not in 1958. *Human Drug Testing by the CIA: Hearings on S. 1893 Before the Subcomm. on Health and Scientific Research of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 157 (1977) [hereinafter *1977 Hearings*]. Respondent also notes (Br. 9) that the CIA and the Army conducted some joint drug research at the Army's Chemical Warfare Laboratories, which is where he was given LSD. It is clear from the portion of the hearings cited by respondent, however, that the CIA was involved in drug testing there only after 1971 (*1977 Hearings* 153).[4]

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[4]Even if the Army had carried out its LSD testing program in conjunction with the CIA, that would not affect the conclusion that respondent's claims are barred. As we explained in our brief in *United States* v. *Johnson*, No. 85-2039 (argued Feb. 24, 1987), the military frequently acts with and through civilian agencies. Service members are barred by *Feres* from bringing tort claims against the government if they suffered injury incident to military service, even if they allege that their injury was caused by the negligence of a civilian, because claims based on injuries incurred incident to military service are "the type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer*, slip op. 6-7). Under *Chappell*, service members should also be barred from pursuing *Bivens* actions in such circumstances, since the purposes underlying the *Feres* doctrine are a special factor counseling against the recognition of a *Bivens* action.

2. Respondent also argues (Br. 25) that because the Army's Inspector General issued a report criticizing aspects of the Army's LSD testing program, proceedings in this case would not conflict with the interests underlying the *Feres* doctrine. The Inspector General did in fact issue a report (which is not a public document and is not in the record) that was critical of the program in many respects, as was the Senate Report. It does not follow from the existence of such a report, however, that *Feres'* interpretation of the FTCA, and *Chappell's* application of *Feres'* reasoning in the context of *Bivens* actions, are rendered irrelevant. Such a conclusion would penalize the government for studying past errors in order to prevent their recurrence. The injuries alleged here remain injuries incurred incident to military service, as to which the FTCA created no remedy, and the adverse impact of allowing damage actions against military personnel seeking redress for such injuries remains substantial, as this Court recognized in *Chappell*.[5]

Contrary to respondent (Br. 22-26), the political branches of government, not the judiciary, are responsible for control of the military. The courts are not to "second-guess military decisions" (*United States* v. *Shearer*, No.

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[5]In connection with the application of *Chappell* in the present context, respondent complains that we failed to specify what particular regulation under the Veterans' Benefits Act compensates for the injuries he alleges he suffered (Br. 36). He contends that he has suffered "severe and permanent * * * mental and psychological injuries" (J.A. 8, ¶ 18); the regulations providing for benefits for "mental disorders" incurred incident to military service are found at 38 C.F.R. 4.125 *et seq.* Respondent also alleges that he should be compensated for the breakdown of his marriage (J.A. 8, ¶ 18), and contends that this case is distinguishable from *Chappell* because the alternative remedy provided by Congress is not a complete remedy (Br. 39). While the Veterans' Benefits Act probably does not authorize all of the relief that respondent might desire (although it does authorize recovery for "*social* and industrial adaptability" (see 38 C.F.R. 4.132; emphasis added)), that does not mean that the Act is not congressional activity in the field.

84-194 (June 27, 1985), slip op. 5), and a trial in this case would clearly require review of the Army's LSD drug testing program by the judiciary.[6] Because respondent was administered LSD incident to military service—indeed, pursuant to an official Army chemical warfare testing program—his claims are barred.

For the foregoing reasons and the additional reasons stated in our opening brief, it is respectfully submitted that the decision of the court of appeals should be reversed.

CHARLES FRIED
Solicitor General

APRIL 1987

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[6]The Senate Report criticized the consent form used by the Army (S. Rep. 94-755, *supra*, at 417) and also criticized the Army's failure to conduct long-term follow-up studies on the participants in the LSD testing program (*id.* at 418). While the Senate Report thus found fault with aspects of the Army's LSD testing program, it of course did not evaluate the program from a legal perspective to determine whether the program as conducted violated the rights of the participants. That issue would be the focus of a trial in this case, requiring further inquiry into the Army's LSD testing program.